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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 576

GILBERT P. SIMONS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF KATE R. SIMONS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (Pet. 11–15) is not reported. The opinion of the Court of Appeals (Pet. 15) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 24, 1955 (Pet. 16). The petition for certiorari was filed on December 16, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Where the donee of a power of appointment exercised the power by will in favor of others than herself, her estate, her creditors or the creditors of her estate, and then became wholly incompetent and without testamentary capacity to alter or revoke that will, was this exercise of the power a partial release of it so as to make the property subject to the power exempt from estate taxes under the Powers of Appointment Act of 1951?

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (f) [as amended by Sec. 2 of Powers of Appointment Act of 1951, c. 165, 65 Stat. 91] *Powers of Appointment.*—
>
> (1) *Property with respect to which decedent exercises a general power of appointment created on or before October 21, 1942.*—To the extent of any property with respect to which a general power of appointment created on or before October 21, 1942, is exercised by the decedent (1) by will or

(2) by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under subsection (c) or (d); but the failure to exercise such a power or the complete release of such a power shall not be deemed an exercise thereof.

If before November 1, 1951, or within the time limited by paragraph (2) of section 403 (d) of the Revenue Act of 1942, as amended, in cases to which such paragraph is applicable, a general power of appointment created on or before October 21, 1942, shall have been partially released so that it is no longer a general power of appointment, the subsequent exercise of such power shall not be deemed to be the exercise of a general power of appointment.

* * * * *

(3) *Definition of general power of appointment.*—For the purposes of this subsection the term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that—

* * * * *

[26 U. S. C. 1952 ed., Sec. 811.]

STATEMENT

The District Court, after trial without a jury, found the facts as follows:

Kate R. Simons, the decedent, died a resident of Kings County, New York, on August 21, 1949, leaving a last will and testament dated May 17, 1940, which was duly admitted to probate by the Surrogate's Court of Kings County on March 9, 1950, and the taxpayer was duly appointed and qualified as executor. (R. 12a, Finding 1.)*

In his estate tax return the taxpayer stated that decedent had possessed a power of appointment created by deed of trust dated April 22, 1931, the property subject to which was valued at $274,140.33, but was not included in the decedent's gross estate. (R. 12a, Finding 2.)

Subsequently, taxpayer filed an amended return repeating that the property subject to the power was not includible in the decedent's gross estate but that in order to save interest he had decided to include this property in the amended return and file a claim for refund for the resulting tax. (R. 12a, Finding 3.)

The resulting tax amounted to $64,515.89, including interest which the taxpayer paid. He then filed a claim for refund which was rejected by the Commissioner. (R. 13a, Findings 4–8.)

The decedent by her last will and testament

* Record references are to the Appendix to petitioner's brief in the Court of Appeals.

fully exercised the power of appointment given her by the trust instrument of April 22, 1931, in favor of others than herself, her estate, her creditors or the creditors of her estate. In 1941, the decedent suffered a stroke and, by August 1942, her condition had deteriorated so that she totally lacked testamentary capacity to execute a new will or alter her 1940 will and she remained in this condition until her death on August 21, 1949. (R. 13a–14a, Finding 10, 11.)

Upon these findings of fact, the District Court concluded that the property subject to the decedent's power of appointment was includible in her gross estate under both subsections (a) and (f) (1) of Section 811 of the Internal Revenue Code of 1939, as amended by Section 2 of the Powers of Appointment Act of 1951, c. 165, 65 Stat. 91, *supra,* pp. 2–3. (R. 14a.)

The District Court thereupon entered judgment (R. 20a) dismissing the complaint. The Court of Appeals for the Second Circuit affirmed upon the opinion of the District Judge. (Pet. 16.)

ARGUMENT

Section 811 (f) (3) of the Internal Revenue Code of 1939, *supra,* p. 3, defines a general power of appointment as one which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate. The language creating the power of appointment (Ex. 1) here involved is as follows:

> * * * and upon the death of said Kate R. Simons, to divide and pay over the principal of the said trust fund, to the extent provided in paragraph FIRST hereof, to such person or persons and/or corporation or corporations, and in such proportions and upon such estates, as said Kate R. Simons may by duly executed last will and testament or instrument in the nature thereof, limit and appoint, and to the extent that she shall fail to make any valid appointment thereof, to the executors or administrators, as the case may be, of the estate of said Kate R. Simons, and to divide and pay over the balance thereof, if any, as in paragraph FIRST provided.

That the power thus created is a general power squarely within the definition of the statute is beyond dispute.

This power was fully exercised by the decedent in her last will and testament in which she appointed the property to numerous relatives. *Wilson* v. *Kraemer,* 190 F. 2d 341 (C. A. 2d), certiorari denied, 342 U. S. 859; *Guaranty Trust Co. of New York* v. *Johnson,* 165 F. 2d 298 (C. A. 2d). The disposition made under the power is quite different from that which would have been made in default of its exercise, for if the decedent had failed to exercise the power the property subject to it would have passed to her estate. In *Guaranty Trust Co. of New York* v. *Johnson, supra,* the court said (p. 300):

> The test of includibility under the appellants' definitions of "exercise," as they themselves have pointed out, is whether the decedent made a disposition of the appointive property different from that provided by the trust instrument in default of the exercise of the power. That she made such a disposition is clear, and that the trust corpus was actually distributed to the takers in default immaterial. The decedent, therefore, clearly exercised her power within the meaning of Sec. 403 (d) (3) and the value of the trust corpus was properly included in her gross estate.

Nevertheless, the taxpayer argues that since the appointment made by the decedent in her 1940 will was in favor of others than herself, her estate, her creditors or the creditors of her estate, and since she was afterward without testamentary capacity to alter or revoke the will by which she exercised the power, this 1940 exercise of the power worked a partial release of it under the second paragraph of Section 811 (f) (1), *supra*, p. 3, and therefore, under that section, the property subject to the power was not taxable.

The basic vice of this argument is that the power, at all times after the execution of the decedent's last will, was in existence until her death and the decedent could have exercised it in any manner she pleased, if her testamentary capacity were restored. The decedent's incapacity was unfortunate but the statute makes no provision

to cover the situation and, since the statute relied upon is one in effect granting an exemption from tax, it is to be in this instance construed according to its terms. *New Colonial Co.* v. *Helvering,* 292 U. S. 435. Petitioner attempts to escape the terms of the statute by contending that the later lack of ability to exercise the power is the equivalent of a release of the power. But when the decedent exercised the power by her last will and testament it was with the intent to *exercise* it and not to *release* it. That the decedent was unable because of her disability to take advantage of the provisions of the relief statute does not transform her inaction, after an exercise of the power, into a release of the power. The fact is that the case falls squarely within the terms of the first paragraph of Section 811 (f) (1) and does not meet those of the second paragraph.

The cases cited by the petitioner do not support his contention. *District of Columbia* v. *Lloyd,* 160 F. 2d 581 (C. A. D. C.), and *Leser* v. *Burnet,* 46 F. 2d 756, 761 (C. A. 4th), simply hold that a power of appointment may be released by an appropriate instrument. *Noble* v. *Rogan,* 49 F. Supp. 370 (S. D. Cal.), holds no more than that where settlors of a trust have reserved the power to modify the trust, by joint action, an attempt at modification by one of the parties after the death of the other is ineffectual.

CONCLUSION

The decision below is correct. It is not in conflict with any decision of this Court or of any other Court of Appeals. The question involved is not of general importance. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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